IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-719

* * *

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Petitioners

V.

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

Respondents

* * *

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FIFTH CIRCUIT

* * *

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner, Jerome D. Chapman, Commissioner of the Texas Department of Human Resources, et al., successors in office to Defendants—Appellees below, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding on July 13, 1977, rehearing denied on August 22, 1977.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas granting your Petitioners' (Defendants below) motion for summary judgment,

Appendix A hereto, is reported at 391 F.Supp. 223 (S.D. Tex. 1975). The opinion of the Court of Appeals for the Fifth Circuit reversing the District Court is Appendix B hereto.

JURISDICTION

Judgment was entered by the Court of Appeals for the Fifth Circuit on July 13, 1977, and a rehearing was denied on August 22, 1977 (Appendices C and D, respectively). This Court's jurisdiction is involved under 28 U.S.C. § 1254(1), upon the basis that the opinion of the Court of Appeals for the Fifth Circuit conflicts with decisions of three other circuits as to jurisdiction, conflicts with prior decisions of this Court, and intrudes into an area of state discretion previously explicitly recognized by this Court.

QUESTIONS PRESENTED

(1) Does 28 U.S.C. § 1343(4) give federal courts jurisdiction over an action asserting that Texas' Aid to Families With Dependent Children Program failed to comply with federal requirements, under statute providing federal jurisdiction to recover damages or to secure equitable or other relief under civil rights laws?

(2) Whether the decision of the Court of Appeals for the Fifth Circuit that Texas must recalculate its standard of need in the Aid to Families With Dependent Children Program conflicts with this Court's prior ruling specifically upholding same in *Jefferson v. Hackney*, 406 U.S. 535 (1972)? Stated another way, did the Court of Appeals misinterpret this Court's ruling in *Van Lare v. Hurley*, 421 U.S. 338 (1975), to apply to a state's calculation of its standard of need in addition

to that holding's admitted applicability to determinations concerning available income?

(3) Did the decision of the Court of Appeals for the Fifth Circuit intrude into an area, the calculation of a standard of need in a state's Aid to Families With Dependent Children Program, explicitly reserved to the states by this Court in *Dandridge v. Williams*, 397 U.S. 471 (1970) and *Jefferson v. Hackney, supra?*

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

United States Constitution, Article 6, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws or any State to the Contrary notwithstanding.

The Civil Rights Act of 1871, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The pertinent section of the Social Security Act, 42 U.S.C. § 602, is included herein as Appendix E due to its substantial length.

45 CFR § 233.90(a) (1976) provides in pertinent part:

> In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent . . . will be considered available for children in the household in the absence of proof of actual contribution.

STATEMENT OF THE CASE

The State of Texas participates in the Aid To Families With Dependent Children Program which is administered through its Department of Human Resources, formerly the Department of Public Welfare. Prior to March 1, 1973, Texas defined three categories of need (personal needs allowance, shelter allowance and utilities allowance) with ceilings in each. The sum of the amounts determined under each category calculated for the family unit was the "standard of need." A percentage reduction, due to the limited availability of funds, of 75% was applied to the standard of need and payments were made to each recipient in the reduced amount, less any income received other than AFDC.

On March 1, 1973, Texas consolidated the above allowances into one need figure determined by the size and composition of the household. The 75% percentage reduction was retained.

Another aspect, which the Court below acknowledges was applied consistently under both plans of

determining AFDC expenditures, is Texas' policy of prorating a recipient's shelter and utility expenses in calculating the standard of need when noneligible individuals live with the recipient. This proration is made in order to take advantage of economies of scale and to prevent the State's limited financial resources available for AFDC from being diverted to the benefit of ineligible persons. Economies of scale exist, of course, as household size increases. As to the latter point, if Texas allowed the "needs" of ineligible persons to be added to the needs it recognizes for eligible persons living in the same household, the effect would be to increase the total level of assistance to a sum sufficient to satisfy their combined needs, even though some of the individuals living in the household are admittedly ineligible. It is this proration policy which was upheld by the District Court but overturned by the Court of Appeals. Both Courts found federal jurisdiction to exist pursuant to 28 U.S.C. § 1343(4).

REASONS FOR GRANTING THE WRIT

The determination of the Court of Appeals for the Fifth Circuit that there is jurisdiction in the instant cause pursuant to 28 U.S.C. § 1343(4) conflicts with the decisions of three other circuits. *Andrews v. Maher*, 525 F.2d 113 (2d Cir. 1975); *Randall v. Goldmark*, 495 F.2d 356 (1st Cir. 1974); and *Gonzales v. Young*, 46 L.W. 2064 (3rd Cir. 1977).

The Courts below used 28 U.S.C. § 1343 as a jurisdictional basis for a 42 U.S.C. § 1983 claim. Section 1983 provides a federal cause of action to redress the deprivation, under color of state law. " . . . of any rights, privileges, or immunities secured by the Constitution and laws . . ." . No clearly sufficient constitutional claim was made by Plaintiffs below; their only colorable claim was that of an alleged conflict

between state regulations and the federal Social Security Act, 42 U.S.C. § 602(a)(23), which, in turn, allegedly violates rights secured by the Supremacy Clause. The Court of Appeals for the Fifth Circuit declined to find the existence of such a claim and relied instead entirely on the statutory claim. Slip Opinion, p. 4430, footnote 1, reproduced in Appendix B.

It is this reliance upon the statutory claim, standing alone, which causes the open and acknowledged conflict between the instant Fifth Circuit opinion and those of the First, Second and Third Circuits cited above.

Additionally, the decision of the Fifth Circuit on the merits that Texas must recalculate its standard of need in the AFDC Program because of the cost-of-living requirement in 42 U.S.C. § 602(a) (23) conflicts with the prior decision of this Court in *Jefferson v. Hackney, supra.* In that case this Court determined that Texas was required under 42 U.S.C. § 602(a) (23) to meet the two broad purposes of the Act, citing *Rosado v. Wyman,* 397 U.S. 397 (1970):

> First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

This Court then went on to find that "Texas has complied with these two requirements." *Jefferson v. Hackney, supra,* at 543-544. Nonetheless, the Fifth Circuit overturned the District Court's determination, based on *Jefferson v. Hackney, supra,* and found Texas in violation of 42 U.S.C § 602(a) (23).

In order to reach this tortured result the Fifth Circuit relied upon a misinterpretation of *Van Lare v. Hurley,*

421 U.S. 338 (1975). The message of *Van Lare* and preceding cases, *King v. Smith,* 392 U.S. 309 (1968) and *Lewis v. Martin,* 397 U.S. 552 (1970), however, is clear. Texas cannot, nor can any other state, presume a contribution of *income* that is unverified simply because an alleged "substitute father", "adult male person assuming the role of the spouse", "non-adopting stepfather", or "lodger" is present in the AFDC recipient's home. That is not what the Texas policy does.

The New York regulation overturned by this Court in *Van Lare, supra,* addresses itself to the application of "income and resources". The Texas policy, on the other hand, speaks only in terms of budgeting a standard of need. The objectionable feature of the New York regulation was a presumption of income available to the AFDC recipient. Texas' policy is totally devoid of any mention of income. It deals only with the budgetary needs of the family.

The process of determining the Texas AFDC recipient's grant went through at least four stages prior to March 1, 1973: (1) the maximum standard of need was established, (2) the number of eligible recipients and the budgetary standard of need was established, not to exceed the maximum, (3) the recognized standard of need was ascertained by application of the percentage reduction factor of 75%, and (4) an amount of non-exempt income was established and deducted from the recognized standard of need to obtain the amount of the grant. The Texas proration factor operated at the second level and did not involve a presumption of income. The New York regulation operated at the fourth level and did involve a presumption of income.

Finally, the Fifth Circuit decision intrudes into an area of state discretion, the calculation of a standard of need in AFDC, explicitly reserved to the states by this

Court in *Dandridge v. Williams*, 397 U.S. 471 (1970) and *Jefferson v. Hackney, supra.* It should be undisputed that Texas has great latitude in dispensing its available funds and that federal law does not prevent it from balancing the stresses which uniform insufficiency of payments imposes on all AFDC families against the greater ability of larger AFDC families, because of inherent economies of scale, to accommodate their needs to diminished per capita payments. *Dandridge v. Williams, supra,* at 480-481, *Jefferson v. Hackney, supra,* at 542-544. This area of state discretion has been penetrated by the Fifth Circuit and that Court has imposed its own view of what Texas' standard of need should be. Such an effort should be turned back by this Court in this case, as it has done in other cases.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit conflicts with the decisions of three other Circuit Courts of Appeal as to jurisdiction, conflicts with prior decisions of this Court on the merits and intrudes into an area of state discretion explicitly recognized by this Court. Accordingly, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals herein.

Respectfully submitted,

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PROOF OF SERVICE

I, DAVID H. YOUNG, Assistant Attorney General of Texas do hereby certify that 3 copies of the foregoing Petition for Writ of Certiorari have been served on Respondents by placing same in the United States Mail, certified, postage prepaid, addressed as follows: Mr. Jeffrey J. Skarda, 2912 Luell Street, Houston, Texas, 77093 and to Mr. John Williamson, Texas Rural Legal Aid, 305 E. Jackson Street, Suite 122, Harlingen, Texas, 78550, on this 16th day of November, 1977.

DAVID H. YOUNG
Assistant Attorney General

/s/ David M. Kendall

APPENDIX A

HOUSTON WELFARE RIGHTS ORGANIZATION, INC., et al., Plaintiffs,

v.

Raymond W. VOWELL, Commissioner of the Texas State Department of Public Welfare, et al., Defendants.
Civ. A. No. 73-H-296.

United States District Court,
S. D. Texas,
Houston Division.
Feb. 11, 1975.

Class action was brought seeking declaratory and injunctive relief on theory that manner of disbursements of AFDC funds in Texas violated federal law in disbursing funds by a flat grant system because of undervaluation of shelter and utility needs in averaging process and because of proration of shelter and utility expenses if nonrecipients shared residence of the recipient. On motions for summary judgment, the District Court, Carl O. Bue, Jr., J., held that it had jurisdiction under civil rights jurisdictional statute, that action was properly maintainable as class action, that method utilized by Texas in converting to flat grant system did not violate the Social Security Act in that maximum allowances for shelter were averaged with expenditures that met actual need but which fell below the maximum, and that proration of shelter and utility expenses did not violate the Act on theory that it assumed that income was available to reduce unmet need, that it identified a portion of total payments to be spent on shelter and utilities, or that it did not result in "fair pricing" of all elements of prior standard of need.

Defendants' motion granted; plaintiffs' motion denied.

1. Courts — 289(2)

Subject matter jurisdiction of federal district court in action under the Social Security Act could not be premised on statute providing original jurisdiction in any federal district court for "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C.A. § 1337; Social Security Act, § 1 et seq. 42 U.S.C.A. § 301 et seq.

2. Courts — 284(4)

Where challenge to state administration of AFDC program was premised solely on alleged violations of federal statutory provisions and not on any constitutional grounds, jurisdiction of federal district court could not be premised on statute providing for original jurisdiction in federal district court "To redress the deprivation, under color of any State law * * * or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights * * * ." 28 U.S.C.A. § 1343 (3); Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.

3. Civil Rights — 13.12(3)
Courts — 299.3(3)

Where action challenging state's administration of AFDC program sought to protect "rights of an essentially personal nature," including statutory rights concerning shelter and food, complaint stated claim cognizable under civil rights statute, and thus within subject matter jurisdiction of federal district court under statute giving court jurisdiction to hear any civil

action "under any Act of Congress providing for the protection of civil rights * * * ." 28 U.S.C.A. § 1343(4); 42 U.S.C.A. § 1983.

4. Federal Civil Procedure — 181

Action challenging state's administration of AFDC program was properly maintainable as a class action where class of recipients involved was so numerous that joinder was impracticable, there were common questions of law and fact, claims of representative parties were typical, representative parties would fairly and adequately protect the interests of the class, and defendants' actions were generally applicable to the class. Fed.Rules Civ.Proc. rule 23(b) (2), 28 U.S.C.A.

5. Social Security and Public Welfare — 194

When a state elects to participate in AFDC program, it is allowed a great deal of leeway to pay as much or little as it wishes so long as its payments are made consistent with the federal statutory scheme. Social Security Act, § 401, et seq., 42 U.S.C.A. § 601 et seq.

6. Social Security and Public Welfare — 194

Texas method of converting to a flat grant AFDC system whereby prior maximum allowances for shelter were averaged with expenditures that met actual need but which fell below the maximum, thus resulting in lower payments to recipients who had previously received the maximum, did not violate Social Security Act on theory that averaging process created a broad distortion of prior standard of need or that such method obsecured the "actual standard of need." Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

7. Social Security and Public Welfare — 194

The use of a flat grant system in dispensing AFDC funds is not in and of itself a violation of any federal

statutory policy. Social Security Act, § 401 et seq., 42 U.S.C.A. § 60[1] et seq.

8. Social Security and Public Welfare — 194

Requirement that components used in computing average need for purposes of converting state's AFDC program to consolidated flat grant system be "fairly priced" bars a state from artificially pricing an item so low that such item would essentially be eliminated in terms of reality, but does not require that items include in average be priced at current market value or some other measure of an ideal price. Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

See publication Words and Phrases for other judicial constructions and definitions.

9. Social Security and Public Welfare — 194

Section of Social Security Act requiring states to adjust standards of need to fully reflect changes in living costs and to proportionately adjust any maximums imposed is not a mandate to eliminate the use of maximums, but is only an incentive to employ a more equitable system of using a percentage reduction, and a state that chooses to continue its program of allocating maximums does not violate said section so long as it adjusts the maximum to reflect changes in living costs as of July 1, 1969. Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

10. Social Security and Public Welfare — 194

For purposes of requirement that state in determining average expenditures in order to convert AFDC program to flat grant system shall not obscure the actual standard of need, "actual standard of need" does not mean a standard of need as determined by

economic realities, but a standard of need as defined by the state prior to passage of section of the Social Security Act requiring adjustment in standard of need to reflect fully changes in living costs since such standards were established. Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

See publication Words and Phrases for other judicial constructions and definitions.

11. Social Security and Public Welfare — 194

Texas policy of prorating that portion of shelter and utility expenses attributable to noneligible individual who may be residing with AFDC recipients does not violate the Social Security Act on theory that it assumes that income is available to reduce unmet need. Social Security Act, § 402(a) (7), 42 U.S.C.A. § 602(a) (7).

12. Social Security and Public Welfare — 194

A state regulation is in conflict with federal standards governing AFDC programs if that regulation establishes an irrebuttable presumption that the income of an individual not having a legal obligation to support a recipient but residing with a recipient is utilized to meet the standard of need recognized by the state. Social Security Act, § 402(a) (7), 42 U.S.C.A. § 602(a) (7).

13. Social Security and Public Welfare — 194

Texas policy of prorating that portion of shelter and utility expenses attributable to noneligible individual who may be residing with AFDC recipients does not violate the Social Security Act on theory that it in essence identifies a portion of the payments which is required to be spent on shelter and utilities. Social Security Act, § 406(b), 42 U.S.C.A. § 606(b).

14. Social Security and Public Welfare — 194

A state may not designate AFDC funds to be spent in a particular manner. Social Security Act, § 406(b), 42 U.S.C.A. § 606(b).

15. Social Security and Public Welfare — 194

Section of Social Security Act defining term "aid to families with dependent children" as meaning "money payments with respect to * * * a dependent child or dependent children * * *" prohibits federal aid being dispensed in kind, or payments being made directly to vendors. Social Security Act, § 406(b), 42 U.S.C.A. § 606(b).

16. Social Security and Public Welfare — 194

Texas policy of prorating that portion of shelter and utility expenses attributable to noneligible individual who may be residing with AFDC recipients, in connection with conversion to flat grant system, does not violate the Social Security Act on theory that it does not result in "fair pricing" of all elements of the prior standard of need. Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

17. Social Security and Public Welfare — 194

Fact that level of AFDC benefits paid does not meet the standard of need that state has defined or does not meet what some may consider necessary for an adequate existence does not mean that flat grant is based on elements that were not "fairly priced." Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

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Jeffrey J. Skarda, Houston, Tex., for plaintiffs.

John L. Hill, Atty. Gen., Austin, Tex., Penny J. Brown, Asst. Atty. Gen., for defendants.

MEMORANDUM AND OPINION

CARL O. BUE, Jr., District Judge.

In this action, plaintiffs challenge the manner in which the Texas Department of Public Welfare disburses funds under the program known as Aid to Families with Dependent Children (AFDC). The named plaintiffs, representatives of a class of welfare recipients whose welfare checks were lowered by Texas' conversion to a flat grant system on March 1, 1973, consist of the Houston Welfare Rights Organization, Inc., a non-profit corporation engaged primarily in providing welfare recipients with information as to their rights, as well as three AFDC recipients, Agnes Stafford, Dorothy Marie Phoenix and Paula Ortega, who head AFDC families. Defendants are the Commissioner of the Texas Department of Public Welfare as well as the Chairman, Vice Chairman and Secretary of the Texas State Board of Public Welfare, all of whom are sued in their individual and representative capacities.

Seeking declaratory and injunctive relief, plaintiffs allege that the manner of disbursement of AFDC funds violates federal law in two instances: (1) disbursing funds by a flat grant system rather than ascertaining the amount of each individual's needs is in violation of 42 U.S.C. § 602(a) (23) because defendants have consistently undervalued shelter and utility needs in the averaging process; (2) the Department's policy of prorating shelter and utility expenses if non-recipients share the residence of the recipient is in violation of 42 U.S.C. §§ 602(a) (7), 606(b) and 602(a) (23). This action is presently before the Court for consideration of both

plaintiffs' and defendants' motions for summary judgment.

JURISDICTION

By their complaint, plaintiffs premise federal jurisdiction upon 28 U.S.C. §§ 1337, 1343(3) and 1343(4).

[1] This Court does not find that subject matter jurisdiction of this action premised upon 28 U.S.C. § 1337 is proper. That section provides original jurisdiction in any federal district court for "any civil action or proceeding arising under any Act of Congress *regulating commerce or protecting trade and commerce against restraints and monopolies*" (emphasis added). The Social Security Act simply does not fall within the category of Congressional acts of this nature. *See* Aguayo v. Richardson, 473 F.2d 1090, 1100 (2d Cir. 1973); Almenares v. Wyman, 453 F.2d 1075, 1082 n.9 (2d Cir. 1971).

[2] Nor does the Court find that jurisdiction premised upon § 1343(3) is proper. That section provides for original jurisdiction in federal district court:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights . . . .

Plaintiffs do not challenge the defendants' administration of the AFDC program on any constitutional grounds. Rather, their cause of action is premised solely upon state violations of federal statutory provisions. Because provisions of the Social Security Act that provide for aid to families with dependent children are not acts "providing for equal

rights of citizens . . ." jurisdiction cannot be premised upon § 1343(3). *See* Almenares v. Wyman, *supra.*

[3] However, subject matter jurisdiction premised upon § 1343(4) is cognizable. That section gives this Court jurisdiction to hear any civil action

> To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Thus, unlike § 1343(3), this provision does not limit federal jurisdiction to claims premised upon federal statutes "providing for equal rights of citizens." In relying upon § 1343(4), plaintiffs assert that their cause of action for violation of certain provisions of the Social Security Act is a civil rights action premised upon 42 U.S.C. § 1983,[1] for which § 1343(4) provides jurisdiction. In view of the fact that the plaintiffs in this action seek to protect" rights of an esentially personal nature," including statutory rights concerning shelter and food, the Court finds that the law of this Circuit would hold that the complaint states a claim cognizable under 42 U.S.C. § 1983. *See* Gomez v. Florida State Employment Service, 417 F.2d 569, 579 (5th Cir. 1969). *See also,* Roselli v. Afflek, 373 F.Supp. 36 (D.R.I.1974); Giguere v. Affleck, 370 F.Supp. 154 (D.R.I.1974). "Such

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[1]That Section provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

fundamental human, highly personalized rights are just the stuff from which § 1983 claims are to be made." Gomez v. Florida State Employment Service, *supra.* Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1343(4).

PROPRIETY OF A CLASS ACTION

[4] The Court finds that this action is properly maintainable as a class action, pursuant to Rule 23(b)(2), Fed.R.Civ.P. In this regard, the class of AFDC recipients who have received less benefits due to the flat grant system is so numerous that joinder is impracticable; there are common questions of law and fact among the various members of the class; the claims of the representative parties are typical of those of the class; the representative parties will fairly and adequately protect the interests of the class, and the defendants' actions are generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class.

MERITS OF THE ACTION

[5] The Federal Aid to Families with Dependent Children program, established by 42 U.S.C. § 601 et seq., involves both state and federal participation to the extent that funds provided by the state are matched by those of the federal government. State participation in the program is voluntary; however, once a state elects to participate, it must do so in a manner consistent with the federal statutory scheme. *See, e. g.*, Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971); Rosado v. Wyman, 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). In this regard, a state is allowed a great deal of leeway to pay as much or as little as it wishes so long as its payments are made consistent with the federal

statutory scheme. *See* Shea v. Vialpando, 416 U.S. 251, 94 S.Ct. 1746, 40 L.Ed.2d 120 (1974); Rosado v. Wyman, *supra* 397 U.S. at 408, 90 S.Ct. 1207; King v. Smith, *supra* 392 U.S. at 318-19, 88 S.Ct. 2128.

In dispensing AFDC funds, a state must first determine " a standard of need," that is, the level at which the absence of resources will make a person eligible for public assistance. Second, the state must determine a "level of benefits," that is, the portion of the recognized standard of need that will be provided. *See* Rosado v. Wyman, *supra* 397 U.S. at 408, 90 S.Ct 1207. Items included within the standard of need vary from state to state as does the level of need that is met by public assistance.

Prior to March 1, 1973. AFDC payments made by the Texas Department of Public Welfare were calculated by first determining the standard of need for each individual family unit.[2] Because Texas does not pay 100

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[2]This standard of need was defined as follows:

Personal need allowance
(1.) $65 for an adult recipient
(2.) $25 for a child under 18 years of age
(3.) $39 for a child 18-21 years of age

Rent or shelter allowance, a dollar maximum,
(1.) For private or owned housing, as paid up to,
(a.) 1-2 persons $33
(b.) 2-4 persons $44
(c.) 5 or more $50
(2.) For public or federally subsidized housing an allowance
(a.) 1 person $36
(b.) 2-4 persons $42
(c.) 5 or more $50

(continued on next page)

percent of this recognized standard of need, this first figure was then reduced by 25 percent, the level of benefits that the state is able to pay. Any income that the family received other than welfare benefits was then subtracted from this reduced figure to obtain the amount that would actually be paid.

On March 1, 1973, the Texas Department of Public Welfare converted its program of dispensing funds by determining need on the basis of each individual family unit to a system of allocating flat grants to each household, the amount being dependent upon the number of recipients within the family unit as well as the type of family unit involved, that is, whether there was within the unit a caretaker recipient or not.[3] In determining the amount of assistance that would be paid to each category, an average expenditure for each group was determined for four seasonal dates: November, 1971; February, 1972; May, 1972 and August, 1972. These seasonal figures were then averaged to determine a single figure that would be paid year round. Keeping in mind the latitude accorded the state in this program, the Court must consider

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Utilities allowed for private housing only $13
Special needs
(1.) dentures $63 once per year
(2.) chronic chiropractic care $6 per month
(3.) chronic podiatrist care $6 per month
(4.) chronic dental care $6 per month
(5.) social care up to $247.50 per month
(6.) glasses $17 once per year
(7.) hearing aids $80 once per year

[3]Monthly needs allowances under the flat grant system consist of the following:

Family size	1	2	3	4	5	6	7	8	9	10	
Non-caretaker	$32	$ 62	$ 90	$118	$146	$174	$202	$230	$258	$286	(irregular)
Caretaker	$ 0	$[illegible]5	$155	$187	$218	$246	1273	$300	$326	$353	(irregular)

plaintiffs' allegations that the conversion to a flat grant system does not comply with the federal statutory scheme upon which federal funds are dispensed.

THE USE OF SHELTER MAXIMUMS

[6] Plaintiffs allege that the method utilized by the Texas Department of Public Welfare in converting to a flat grant system violates 42 U.S.C. § 602(a) (23) in that the maximum allowances for shelter were averaged with expenditures that met actual need but which fell below the maximum, thus resulting in lower payments to recipients who had previously received the maximum. Thus, prior to converting to a flat grant system, the state had paid benefits for shelter based upon actual need only if that need was less than the "maximum" figure that the state had set. If actual need exceeded this maximum figure, only the maximum figure was paid.

Section 602(a) (23) of Title 42 requires that the state agency:

> provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted . . . .

In Rosado v. Wyman, *supra*, the Supreme Court, after reviewing the legislative history of this provision, described its purpose as twofold:

> First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which

> their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

Id. 397 U.S. at 412-13, 90 S.Ct. at 1218. To accomplish this purpose, the Court held that the states must:

> first, . . . re-evaluate the component factors that compose their need equation; and, second, any "maximums" must be adjusted.

However, even in light of this federal mandate, the Court in *Rosado* recognized that:

> A State may, after recomputing its standard of need, pare down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system, but it may not obscure the actual standard of need.

In Jefferson v. Hackney, 406 U.S. 535, 543, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972), the Court recognized that Texas had complied with the provisions of § 602(a) (23). The same system of allocation upheld in *Jefferson* provided the figures that were averaged to arrive at a flat grant. However, plaintiffs allege that by averaging the shelter benefits for those recipients previously receiving the maximum payments for shelter with those recipients who receive less than the maximum results as a matter of necessity in those who had previously receive the maximum receiving less.

[7] The use of a flat grant system in dispensing AFDC funds is not in and of itself a violation of any federal statutory policy. *See* Rosado v. Wyman, *supra* 397 U.S. at 419, 90 S.Ct. 1207. It is recognized that such an averaging process will result in some families receiving more benefits while other families receive

less. *Id* Roselli v. Afflek, *supra*, 373 F.Supp. at 44; Johnson v. White, 353 F.Supp. 69 (D.Conn. 1969). Indeed, this is a natural result of the averaging process; those families who had previously received the largest payments will receive les, regardless of whether maximum benefits are determined through the use of a "maximum" or some other system of allocation.

[8] In *Rosado*, the Supreme Court set forth the manner in which a state may comply with § 602(a) (23) in instituting a flat grant system.

> We do not, of course, hold that New York may not, consistent with the federal statutes, consolidate items on the basis of statistical averages. . . . Providing all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may, of course, consistent with § 402(a) (23) redefine its method for determining need.

Id. 397 U.S. at 419, 90 S.Ct. at 1221. Plaintiffs appear to argue that this dicta authorizes the Court to consider whether the items include in the average were priced at their current market value or some other measure of an ideal price. The Court agrees, however, with the interpretation of the phrase "fairly priced" given by the court in New Jersey Welfare Rights Organization v. Cahill, 349 F.Supp. 501 (D.N.Y.1972), aff'd 483 F.2d 723 (3d Cir. 1973):

> By the words 'fairly priced' the Supreme Court was apparently trying to prevent a state, barred from totally climinating a factor from the content of its former standard of need, from artificially pricing an item so low that that item would essentially be eliminated in terms of reality.

New Jersey Welfare Rights Organization v. Cahill *supra* 349 F.Supp. at 511. To apply a more subjective interpretation to this term would be to accord federal courts power to interfere with determinations regarding the standard of need that the individual states are entitled under the law to make.

In the instant case, even though the benefits paid may not be based upon actual need, plaintiffs have failed to demonstrate that the state, in consolidating its need figures, either omitted a previously included item of need or artificially priced an item so low that it was essentially eliminated. Furthermore, although plaintiffs urge the Court to consider, as did the Court in Roselli v. Affleck, *supra*, if the averaging process creates a broad distortion of the prior standard of need, there has been no evidence of such a broad distortion presented to support a finding by this Court that the defendants have violated § 602(a) (23) by unfairly averaging consolidated items.[4]

[9] By way of their brief in support of their motion for summary judgment, plaintiffs appear to be arguing that the flat grant system violated § 602(a) (23) because that provision was ostensibly designed to encourage the state to abandon the use of maximums. However, it was not the purpose of that statutory provision to require that states abandon the use of such methods of determining how their respective levels of need will be

[4]Although plaintiffs have demonstrated that the largest cuts in AFDC benefits resulting from the averaging process, were expreienced by recipients living in private, as opposed to public, housing, the Court does not find that the disparity in these cuts between families of comparable size in different types of housing is so great as to create a broad distortion of an inequitable result.

met. Conversely, the statute requires only that any maximums that a state choosed to use be "updated" as of July 1, 1969. In Rosado v. Wyman, *supra* 397 U.S. at 41314, 90 S.Ct. 1207, 1218, the Court recognized that "by imposing on those States that desire to maintain 'maximums' the requirement of an appropriate adjustment, Congress has introduced an incentive to abandon a flat 'maximum' system, thereby encouraging those States desirous of containing their welfare budget to shift to a percentage system . . . "Thus, § 602(a) (23) is not a mandate to eliminate the use of maximums; it is only an incentive to employ a more equitable system of using a percentage reduction, that is a method whereby available funds are dispensed to meet a specified percentage of need as defined by the state. A state that chooses to continue its program of allocating maximums does not violate § 602(a) (23) so long as it adjusts the maximum to reflect changes in living costs of July 1, 1969. Because the State of Texas increased its maximum 11 percent to comply with this mandate, *see* Jefferson v. Hackney, *supra*, and because this increase was reflected in the shelter figures averaged to implement the flat grant system, it cannot be said that the use of these updated maximums violated § 602(a) (23).

[10] Moreover, this Court does not find as plaintiffs further argue that the use of maximums in determining average expenditures obscures "the actual standard of need" as prohibited by § 602(a) (23). *See* Rosado v. Wyman, *supra* 397 U.S. at 413, 90 S.Ct. 1207. In this regard the term "actual standard of need" does not mean a standard of need as determined by economic realities, but the standard of need as defined by the state prior to

the passage of § 602(a) (23).[5] Section 602(a) (23), as interpreted in *Rosado*, does not require that a state's standard of need be consistent with the amount that recipients actually pay to live, only that it be adjusted upward to reflect increases in the cost of living. In requiring that standards of need be updated to reflect increases in the cost of living, § 602(a) (23), merely required a state that lacked funds to increase the actual payments to recipients to lower the level of benefits paid and to refrain from camouflaging this shortcoming by tampering with its existing standard of need. Thus, one purpose ascribed to § 602(a) (23) was that of "forcing a State to accept the political consequence of [lowering the level of benefits paid] and bringing to light the true extent to which actual assistance falls short of the minimum acceptable." Rosado v. Wyman, *supra* 397 U.S. at 413, 90 S.Ct. at 1218.

In the present case, defendants have not attempted to eliminate from the standard of need any item, nor has the state lowered the standard by placing more restrictive conditions upon the ability to qualify for such benefits. *See* Rhode Island Fair Welfare Rights Organization v. Department of Social and Rehabilitative Services, 329 F.Supp. 860 (D.R.I. 1971). Thus, it cannot be said that by changing to a flat grant system defendants obscured the standard of need. *See* Johnson v. White, 353 F.Supp. 69, 78 (D. Conn. 1972).

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[5]Although the court in Roselli v. Affleck held that the state must consider economic realities in determining a consolidated needs figure of violate § 602(a) (23), this is the result of Rhode Island's practice of defining its standard of need for shelter as the actual cost of shelter born by the recipient, rather than using a maximum shelter figure. *See* Roselli v. Affleck, *supra* 373 F.Supp. at 43.

THE POLICY OF PRORATING SHELTER AND UTILITY EXPENSES

The Texas Department of Public Welfare has traditionally adhered to a policy of prorating that portion of shelter and utility expenses attributable to a non-eligible individual who may be residing with recipients. The statement of this policy that was in effect during the period November, 1971, through August, 1972, when the averaging for the flat grant system occurred, is set forth in the Texas Department of Public Welfare's Financial Services Handbook, Revision Number 23, which provides as follows:

Section 3122, paragraph 5

> When a recipient shares living arrangements with non-dependent relatives, his budget will carry his prorata share and that of his dependents of the utility charge figure, provided the non-dependent relative does not meet this expense for him.

Section 3122.3, paragraph 4, 5 and 6

> When the applicant or recipient lives with non-dependent relatives in their shelter, his prorata share(s) of the shelter expense [within the group maximum] shall be budgeted provided the non-dependent relative does not meet all this expense for him. This means that the applicant and/or recipient must actually be participating in meeting shelter expense before his prorate share(s) can be budgeted.
>
> When non-dependent relatives live with applicant in his shelter, the applicant's prorate share(s) of the shelter expenses [within the

group maximum] shall be an allowable expense, providing the non-dependent relatives do not meet this expense for him.

Regardless of the economic situation of the non-dependent relative in either of the above situations, both shelter and utilities will be budgeted only in the amount of the prorata share for the applicant and his dependents.

Under these provisions, the recipient is paid that portion of the amount he would ordinarily receive if the entire household were eligible as the number of eligible parties bears to the number of non-eligible parties. Thus, if in a group of four persons living in private housing, only two of whom are eligible for AFDC assistance, AFDC shelter payments would be determined by allocating payments of 50 percent of $44.00, the maximum for a family of four. The eligible parties would receive $22.00 as opposed to $33.00, the amount to which they would be entitled if they were living alone.

[11] Plaintiffs argue that the Texas policy of proration is in violation of 42 U.S.C. § 602(a)(7) in that it assumes that income is available to reduce unmet need. Defendants counter this argument by characterizing the proration policy as a method of determining the standard of need, which is left to the discretion of the individual state, as opposed to a method by which unmet need is reduced. Further, defendants justify the policy by arguing that it is an effective method to prevent AFDC payments from reaching the hands of individuals who are not able to receive them.

[12] Plaintiffs' argument of an inappropriate assumption of income is premised upon 42 U.S.C. § 602(a) (7) as that provision has been interpreted in 45

C.F.R. § 233.90(a) and 45 C.F.R. § 233.20(a) (3) (ii) (c):

A State Plan for . . . AFDC . . . must . . .

(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered . . . .

See Lewis v. Martin, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). Thus, it is beyond dispute that a state regulation is in conflict with federal standards if that regulation establishes an irrebuttable presumption that the income of an individual not having a legal obligation to support a recipient but residing with a recipient is utilized to meet the standard of need recognized by the state. *See, e. g.*, Lewis v. Martin, *supra* (income of stepfather may not be presumed to be available for support of stepchildren); Solman v. Shapiro, 300 F.Supp. 409 (D. Conn. 1969). aff'd, 396 U.S. 5, 90 S.Ct. 25, 24 L.E.d.2d 5 (1969) (income of stepfather may not be presumed to be available for support of stepchildren); Reyna v. Vowell, 470 F.2d 494 (income of minor may not be presumed to be available for support of family); Gillard v. Craig, 331 F.Supp. 587 (W.D.N.C.), aff'd, 409 U.S. 807, 93 S.Ct. 39, 34, L.Ed.2d 66 (1972) (support payments to one child cannot be used to reduce assistance payable to siblings). However, it is also beyond dispute that a state has considerable discretion in determining its own standard of need. *See* King v. Smith, *supra* 392 U.S. at 318, 88 S.Ct. 2128. Thus, the question for determination is whether the proration policy operates as an assumption of income or is the method of determining the standard of need for households in which both recipients and non-recipients

reside.

In considering the similar provisions of another state, one court has held that proration policies are not an assumption of income that violates federal law. *See* Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974); *ef.* Owens v. Parham, 350 F.Supp. 598, 605 (N.D.Ga.1972). In this regard, the policy of proration was not held to be an assumption of income, but rather a recognition of the fact that the cost of housing per person decreased with the increase in the number of persons occupying a single dwelling.

In support of their argument, plaintiffs rely heavily upon the decision in Roselli v. Affleck, *supra*, in which the district court struck down Rhode Island's method of converting to a flat grant system because pro-rated units were averaged with units in which all residents were AFDC recipients. However, the state provisions in that instance differ from those now before the Court in that the Rhode Island plan presumed that a non-recipient man assuming the role of spouse was responsible for the support of himself as well as the woman with whom he was living. Thus, the income of the non-recipient man was assumed to be available to support a recipient, an assumption clearly in violation of § 602(a) (7). In the instant case, however, the income of the non-recipient is presumed only to satisfy his own needs and not that of recipients.

From a consideration of the Texas program, the Court does not find that the proration of shelter and utility expenses operates as an assumption of income to satisfy unmet need of a recipient. Rather, the proration policy is the result of the manner in which the state has chosen to define need for shelter and utilities. In this regard, the standard of need set forth by the Texas Department of Public Welfare remains the same for an individual

living in a mixed unit as it does for an individual living in a unit in which all members are recipients. For example, during the period from which the flat grant system averages were derived, the Texas standard of need for private shelter was defined as follows:

Family of 2	$33 per month
Family of 3-4	$44 per month
Family of 5 or more	$50 per month

See Lopez v. Vowell, 5 Cir., 471 F.2d 690, 692 n. 5. Utilities were allocated per unit at a flat rate of $13 per month. Thus, the shelter needs for an individual residing in a unit of two persons is defined by the state at $16.50 per month for each person. The shelter needs for a unit of four persons defined at $11.00 per month for each person. The fact that a non-recipient resides within the unit does not diminish the payments to the individual to meet his shelter needs as recognized by the state standard of need. That is, even if one member of a unit of four persons is a non-recipient, the state will continue to attempt to meet the level of need it recognizes for those individuals who are recipients; the state will continue to pay $11.00 per recipient, which is the standard of need for an individual in a four-person unit, even though the total amount received by the unit will be less.

Plaintiffs argue that a more equitable situation would result if the state were to accord shelter benefits based upon the number of recipients in the unit, rather than the total number of persons within the unit. Thus, if in a unit of four persons, two are AFDC recipients, plaintiffs would have the state define their standard of need for shelter at $33.00 or the equivalent for a family of two recipients residing alone. However, the state has chosen to recognize the economies of scale inherent in larger

living groups, *see* Dandridge v. Williams, 397 U.S. 471, 479, 480, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), and to define its standard of need by the size of family units as opposed to the number of recipients residing together. This Court has no power to require that the state define this standard otherwise.

The Court is cognizant that the proration provisions of New York have been struck down in the past as violative of due process because those provisions establish an irrebuttable presumption that a non-recipient contributes his pro rata share of expenses. *See* Hurley v. Van Lare, 380 F.Supp. 167 (S.D.N.Y.1974) (three-judge panel). Other courts have held proration provisions valid facially but invalid as applied. *See* Owens v. Parham, *supra;* Mothers and Children's Rights Organization, Inc. v. Stanton, 371 F.Supp 298 (N.D.Ind. 1973). *See also* Dullea v. Ott, 316 F.Supp. 1273 (D.Mass.1970). However, plaintiffs in this case have not raised, briefed or argued due process claims. There has been no evidence presented as a matter of record with regard to the manner in which the Texas program has been administered. Accordingly, this Court does not find the due process issue before it. Plaintiffs' allegations that the state's proration policy violates 42 U.S.C. § 602(a) (7), are without merit.

[13] Plaintiffs further challenge the proration policy as violative of 42 U.S.C. § 606(b):

> The term 'aid to families with dependent children' means money payments with respect to . . . a dependent child or dependent children . . . .

The purpose of this provision, as interpreted by HEW in its Handbook of Public Assistance Administration, is to provide the recipient with the right to manage his

affairs, the choice of determining how the assistance can best be used to meet his needs and the ability to make purchases through the normal channels of commerce. *See* Handbook of Public Assistance Administration § 5120. Plaintiffs argue that these provisions prohibit a state from identifying a sum of money with the requirement that it be spent in a certain manner or in restricting a part of the payment. By providing a lower payment for fixed expenses such as shelter and utility needs, plaintiffs allege that the state has in essence identified a portion of the payments to the plaintiff to be spent on shelter and utilities.

[14, 15] While plaintiffs are correct in their contention that a state may not designate AFDC funds to be spent in a particular manner, their argument that proration has this effect is without merit. Section 606(b) prohibits federal aid being dispense in kind, or payments being made directly to vendors. *See* X v. McCorkle, 333 F.Supp. 1109, 1119 (D.N.J.1970). In the instant case, however, all payments are made in money with no condition upon how the money is to be spent. The fact that a state may provide a recipient with less than he actually needs or less than the amount it defines in its standard of need is not a condition that money be spent in a particular manner. The recipient is still provided with the choice of the manner in which he will use his resources.

[16, 17] Lastly, plaintiffs challenge the proration policy as violative of 42 U.S.C. § 602(a) (23) by alleging that inclusion in the averaging for the flat grant system of the proration policy does not result in "fair pricing" of all elements of the prior standard of need.

By applying the more technical interpretation to the term "fair pricing" that the Court adopted earlier in this opinion, the Court does not find that the averaging of

prorated shelter and utility payments in determining the flat grant system violates § 402(a) (23). In so doing, the state did not artificially lower the amount that it paid to recipients who received prorated shelter expenses. In determining the flat grant shelter allowance, the state used all shelter expenditures that were actually made the year before. The fact that the level of benefits paid does not meet the standard of need that it has defined or does not meet what some may consider necessary for an adequate existence does not mean that the flat grant is based upon elements that were not "fairly priced". *See* New Jersey Welfare Rights Organization v. Cahill, *supra* 349 F.Supp. at 511.

In accordance with the foregoing defendant's motion for summary judgment is granted. Plaintiffs' motion for summary judgment is denied. Defendants will prepare and submit an appropriate judgment for entry within thirty (30) days.

APPENDIX B

HOUSTON WELFARE RIGHTS ORGANIZATION, INC., et al., Plaintiffs-Appellants,

v.

Raymond W. VOWELL, etcl., et al., Defendants-Appellees.

No. 75-2815.

United States Court of Appeals, Fifth Circuit.

July 13, 1977.

Appeal was taken from an order of the United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., 391 F.Supp. 223, holding that the Texas Department of Public Welfare's administration of the AFDC program did not violate federal law. The Court of Appeals, Gee, Circuit Judge, held that: (1) the Department of Public Welfare's policy of prorating recipients' shelter and utility expenses in calculating the standard of need when eligible individuals lived with the recipient violated federal law by presuming that the noneligible individual living with the recipient contributed toward the shelter and utility expenses, thus reducing the need of recipient, except as it applied to a recipient living with nondependent relatives in their shelter, and (2) the Department of Public Welfare's method of converting to a flat-grant AFDC system whereby prior maximum allowances for shelter were averaged with expenditures that met actual need but which fell below the maximum, thus resulting in lower payments to recipients who had previously received the maximum, did not violate the Social Security Act.

Reversed.

1. Federal Courts — 228

District court had jurisdiction over action asserting that state's administration of its program of aid to families with dependent children failed to comply with federal requirements, under statute providing federal jurisdiction to recover damages or to secure equitable or other relief under civil rights law. 28 U.S.C.A. § 1343(4).

2. Social Security and Public Welfare — 194.1

States electing to receive funds under aid to families with dependent children program must employ them in programs which do not conflict with Social Security Act. Social Security Act, § k402 as amended 42 U.S.C.A. § 602.

3. Social Security and Public Welfare — 194.13

Texas Department of Public Welfare's policy of prorating AFDC recipient's shelter and utility expenses in calculating standard of need when noneligible individual lived with recipient violated Social Security Act by presuming that noneligible individual living with recipient contributed towards shelter and utility expenses, thus reducing need of recipient, except as it applied to recipient living with nondependent relatives in their shelter. Social Security Act, § 402 as amended 42 U.S.C.A. § 602.

4. Social Security and Public Welfare — 194.14

Texas method of converting to flat-grant AFDC system whereby prior maximum allowances for shelter were averaged with expenditures that met actual need but which fell below maximum, thus resulting in lower payments to recipients who had previously received

maximum, did not violate Social Security Act. Social Security Act, § 402(a) (23) as amended 42 U.S.C.A. § 602(a) (23).

5. Social Security and Public Welfare — 194.14

In averaging process leading to flat-grant AFDC system, all factors must be fairly priced and "fairly priced" means that state may not artificially price item so low that item is essentially eliminated from standard of need. Social Security Act, § 402(a) (23) as amended 42 U.S.C.A. § 602(a) (23).

See publication Words and Phrases for other judicial constructions and definitions.

6. Social Security and Public Welfare — 194.14

In averaging process leading to adoption of flat-grant AFDC system, statistical basis used must reflect fair averaging and "fair averaging" at the very least requires technical statistical validity in state's procedures and court must look at end product of averaging process to determine whether figures produced by averaging are consistently and materially out of proportion with relevant former definition of standard of need. Social Security Act, § 402(a) (23) as amended 42 U.S.C.A. § 602(a) (23).

See publication Words and Phrases for other judicial constructions and definitions.

7. Federal Courts — 268

Eleventh Amendment barred recovery of retroactive AFDC benefits, nor could recipients recover from Texas Children's Assistance Fund and Disabled Assistance Fund on theory that those funds were separate from state treasury. Vernon's Ann.Tex.Civ.St. art. 695c, § 17(6); U.S.C.A.Const. Amend. 11.

Before GODBOLD, SIMPSON and GEE, Circuit Judges.

GEE, Circuit Judge:

[1] This appeal requires us to consider whether the state of Texas, in the administration of its program of Aid to Families with Dependent Children (AFDC), complied with federal requirements.[1] The district court concluded that the Texas Department of Public Welfare's administration of the AFDC program did not violate federal law, *see Houston Welfare Rights Organization, Inc. v. Vowell*, 391 F.Supp. 223 (S.D.Tex. 1975). Plaintiffs appeal, arguing two major points: first, that Texas' policy of budgeting only a prorata share of shelter and utility expenses when a non-AFDC recipient

[1]The nature of the plaintiffs' case requires an examination of the question of subject-matter jurisdiction. Unlike similar cases challenging state adherence to federal AFDC program requirements, plaintiffs do not challenge Texas' AFDC system on constitutional grounds that provide federal jurisdiction to hear pendent claims of statutory violation. *See, e. g., Hagans v. Lavine*, 415 U.S. 528, 536-44, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Plaintiffs bring a statutory action only. Nevertheless, the district court properly concluded that it had jurisdiction under 28 U.S.C. § 1343(4), which provides federal jurisdiction "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." In analogus contexts we have held that statutory rights concerning food and shelter are "rights of an essentially personal nature" and that plaintiffs may invoke 42 U.S.C. § 1983 to protect those rights. *See Gomez v. Florida State Employment Service*, 417 F.2d 569, 580 n. 39 (5th Cir. 1974). Although other circuits disagree, *see Andrews v. Maher*, 525 F.2d 113 (2d Cir. 1975); *Randall v. Goldmark*, 495 F.2d 356 (1st Cir. 1974), we have held that § 1983 is an "Act of Congress providing for the protection of civil rights", sufficient to invoke § 1343(4) jurisdiction. *See Gomez, supra; Hall v. Garson*, 430 F.2d 430 F.2d 430 (5th Cir. 1970).

shares a recipient's residence violates federal regulations; and second, that Texas' use of an averaging process in changing from a system of individual budgeting employing ceilings on allowable need to a consolidated flat-grant system obscured the standard of need in violation of congressional requirements. We hold that the proration policy is invalid and remand to the district court for the entry of an order mandating a re-evaluation of the standards of need established under the new system.

FACTS

[2] Aid to Families with Dependent Children (AFDC) is a public assistance program established by the Social Security Act of 1935, as amended, 42 U.S.C. § 602 (1970). AFDC provides federal matching funds to states choosing to participate in order to aid the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from home, or physical or mental incapacity of a parent, who is living with" any of the several listed relatives. 42 U.S.C. § 606(a) (1970). States electing to receive such funds must employ them in programs which do not conflict with the Social Security Act. *Van Lare v. Hurley*, 421 U.S. 338, 340, 95 S.Ct. 1741, 44 L.Ed.2d 208 (1975); *Townsend v. Swank*, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971).

Two aspects of federal administration of the AFDC program are of importance here. The first is a federal regulation, 45 C.F.R. § 233.90(a) (1976), that provides in part:

> In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the

> parent . . . will be considered available for children in the household in the absence of proof of actual contributions.

The second is a congressional requirement imposed on participating states by 42 U.S.C. § 602(a) (23) (1970),[2] which requires that states adjust the determination of needs of individuals to reflect changes in living costs up to July 1, 1969. In *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), the Supreme Court noted two reasons for this requirement:

> First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

397 U.S. at 412-13, 90 S.Ct. at 1218.

The State of Texas participates in the AFDC program and administers it through the Texas Department of Public Welfare (DPW). Prior to March 1, 1973, Texas' AFDC program employed a combination of ceilings on allowable need and percentages of the allowable need to determine the level of benefits for recipients. The procedure is fully described in the district court's opinion, *see* 391 F.Supp. at 227-28. It sufficies to say here that the DPW defined three categories of need (personal

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[2](a) A State plan for aid and services to needy families with children must . . . .

> (23) provide that by July 1, 1969, the amount used by the State to determine the needs of individuals will have been adjusted to reflect fully charges in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted . . . .

need allowance, shelter allowance and utilities allowance), with ceilings upon each category.[3] The sum of the amounts determined under each category calculated for the family unit was the "standard of need." The DPW determined the "level of benefits" by taking 75% of this standard of need. The payment to each recipient was further decreased by any income he received other than welfare benefits. On March 1, 1973, the DPW converted its program by consolidating the various categories and standards of need to one figure determined by the size and composition of the household.[4] The level of benefits is 75% of the consolidated figure. The DPW determined the consolidated figure by averaging past standards of need for households of various sizes and compositions receiving AFDC payments. Thus, the DPW changed from a system of individualized budgets to standarized budgets with an attendant increase in administrative efficiency.

Another aspect of the Texas system of AFDC expenditure applied consistently under both plans of determining AFDC expenditure is the DPW's policy of prorating recipients' shelter and utility expenses in calculating the standard of need when noneligible

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[3]For example, the shelter allowance for one or two persons in private housing was $33; if a recipient paid more, the ceiling was $33; if he paid less, the actual amount paid determined his need.

[4]Texas accomplished this consolidation by averaging the amounts paid to the total universe of AFDC families of various sizes, in the caretaker and noncaretaker categories, for the months of November 1971, February 1972, May 1972 and August 1972. The DPW obtained the average of all families of certain size in each category for the items of personal needs, housing, utilities, glasses, dentures, hearing aids, professional care and social care.

individuals live with a recipient.[5] The proration occurs whether or not the noneligible lodger actually contributes to the shelter and utility expenses of the household. The DPW justifies the policy as recognizing the economies of scale which result when several individuals live in one shelter and as avoiding state payment of a noneligible individual's shelter and utility expense. The proration policy has the effect of lowering the recipient's allowable need so as to lower, in turn, his level of benefits.

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[5]3122 *Utilities*, paragraph 5. "When a recipient shares living arrangements with non-dependent relatives, his budget will carry his prorata share and that of his dependents of the utility chart figure, provided the non-dependent relative does not meet this expense for him."

3122.2 *Shelter*, paragraphs 4, 5 and 6. "When the applicant or recipient lives with non-dependent relatives in their shelter, his prorata share(s) of the shelter expense [within the group maximum] shall be budgeted *provided* the non-dependent relative does not meet all this expense for him. This means that the applicant and/or recipient must actually be participating in meeting shelter expense before his prorata share(s) can be budgeted.

"When non-dependent relatives live with the applicant in his shelter, the applicant's prorata share(s) of the shelter expenses [within the group maximum] shall be an allowable expense, providing the non-dependent relatives do not meet this expense for him. "Regardless of the economic situation of the non-dependent relative in either of the above situations, both shelter and utilities will be budgeted only in the amount of the prorata share of the applicant and his dependents."

Texas DPW, Financial Services Handbook, Revision No. 23.

PRORATION POLICY

[3] Plaintiffs challenge the Texas DPW's proration policy as violating 45 C.F.R. § 233.90(a) (1976) by presuming that the noneligible individual living with the recipient contributes toward the shelter and utility expenses, thus reducing the need of the recipient. The DPW responds that its policy does not presume *income* to the recipient, only reduction of the recipient's standard of need. The DPW merely presumes that the nonrecipient will pay his own way. The nonrecipient's presumed contribution to cover his expenses combined with economies of scale realized by group living indicates that the recipient's standard of need is less. The district court accepted the state's argument, but a Supreme Court decision since the district court's determination, *Van Lare v. Hurley*, 421 U.S. 338, 95 S.Ct. 1741, 44 L.Ed.2d 208 (1975), mandates a different result.

In *Van Lare*, the Supreme Court considered the effect of a New York public welfare regulation similar to that of Texas:

> A non-legally responsible relative or unrelated person in the household . . . shall be deemed to be a lodger or boarding lodger . . . . In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular allowance.

18 N.Y.C.R.R. § 352.30(d). The Court found the regulations invalid "insofar as they are based on the assumption that the nonpaying lodger is contributing to the welfare household, without inquiry into whether he in fact does so." 421 U.S. at 346, 95 S.Ct. at 1747. *Van Lare* appears to control, but the state attempts to

distinguish it on the ground that the invalidated New York statutory scheme specifically presumed that the income of a lodger was devoted to his prorata share of shelter costs.

The state's attempt to distinguish *Van Lare* fails. The relevant New York statute provided in pertinent part:

18 N.Y.C.R.R. § 352.1:

(a) For applicant or recipient.

* * * * * * *

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional transient basis, his available income and resources shall be applied in accordance with the following:

* * * * * * *

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d).

352.30 Persons included in the budget.

* * * * * * *

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger,

the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. *In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.* (emphasis supplied)

The state argues that the language of § 352.31(a)(3) ("his available income and resources shall be applied in accordance with the following") and § 352.30(d) ("The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family") reveal that the New York scheme for reducing the shelter allowance prorata involved a presumption of income to the welfare family, not apresumption of reduced need. We disagree with the state's characterization of the New York approach. Although the New York scheme generally speaks of income, the relevant section in which the prorata policy appears does not explicitly presume that the nonrecipient's income will be applied to shelter expense;[6] instead, the statute implies that an AFDC family with a lodger has a reduced need for shelter so that the shelter allowance is reduced prorata. Further, in *Taylor v. Lavine*, 497 F.2d 1208 (2d Cir. 1974), the Second Circuit case later reversed in *Van Lare*, the Second Circuit upheld the New York scheme specifically on the ground urged here by Texas: that the statute merely provided a means of determining actual

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[6]In fact, the provisions mentioning income relied upon by the state refer only to the application of the income of a "man in the house." The provision struck down in *Van Lare* refers to all nonlegally responsible relatives or unrelated persons, including mothers, over-age children or sisters. These, too, qualified as lodgers with no provisions specifically mentioning that their status was a way of presuming that their income was available to the family.

need and reflected the economies of scale realized in group living. 497 F.2d at 1215-16. Because we can find no meaningful distinction between the statutory scheme struck down in *Van Lare* and the Texas DPW's proration policy, we conclude that *Van Lare* controls, and the proration policy is improper.

Even had Texas successfully distinguished the New York statutory scheme from its proration policy, the DPW's policy still runs afoul of 45 C.F.R. § 233. 90(a). The presumption that a recipient's shelter and utility expenses are lowered—creating less need— when a nonrecipient lives in the household implicitly presumes that the nonrecipient's income is available to offset his share of the shelter and utility costs. *See Hoehle v. Loking*, 405 F.Supp. 1167, 1174 (D.Minn.1975), *aff'd*, 538 F.2d 229 (8th Cir. 1976). If not, the recipient's "need," in terms of actual shelter cost, will not decrease. The DPW's claim that it is only reflecting the economies of scale enjoyed by large groups living together again implicitly presumes that the non recipient's income will be available to offset shelter and utilities. Without that presumption, the economies-of-scale argument is irrelevant. As examples, the total cost of shelter and utilities to the AFDC household has not changed; it remains in need of that amount. *See Taylor v. Lavine*, 497 F.2d 1208, 1222 (2d Cir. 1974) (Oakes, Jr., dissenting); Note, 88 HARV.L.REV. 654, 658-59 (1975). If the nonrecipient moves out, the household receives a full share even though its rent obligation has not increased. Clearly, as in *Van Lare*, "the nonpaying lodger's mere presence results in a decrease in benefits", 421 U.S. at 346, 95 S.Ct. at 1747, and "the fact that the allowance varies with the lodger's presence demonstrates that it is keyed, as the regulations plainly imply, to the impermissible assumption that the lodger is contributing income to the family." 421 U.S. at 347, 95 S.Ct. at 1748. The state's argument that it should be

allowed to avoid paying for a nonrecipient's shelter also is answered in *Van Lare:*

> Another, somewhat related, justification asserted is that the shelter allowance is reduced to prevent lodgers, who by definition are ineligible for welfare, from receiving welfare benefits. The regulations, however, do not prohibit lodgers from living in welfare homes. The lodger may stay on after the allowance is reduced, and the State takes no further action. The only victim of the state regulations is thus the needy child who suffers reduced benefits. But States may not seek to accomplish policies aimed at lodgers by depriving needy children of benefits. *King v. Smith*, supra [392 U.S. 309] at 326, 88 S.Ct. 2128, at 2138, 20 L.Ed.2d 1118; *Lewis v. Martin* [397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970)] supra.

Thus, the DPW's proration policy, in presuming that a recipeint's need decreases when a nonrecipient resides in the household, violates federal regulations controlling state administration of AFDC programs because his need of assistance does not decrease unless the nonrecipient is paying his own way.

This does not mean that the entire proration policy is invalid, however. When a recipient lives with nondependent relatives in their shelter, the DPW recognizes his need only to the extent of the recipient's prorata share of shelter and utility costs. This policy does attempt to assess the need of the recipient and does not unlawfully presume the availability of income to him. Both justifications of the proration policy as an assessment of need validly apply. Economies of scale are realized, as the recipient adds to the group living in the shelter and reduces the per capita shelter cost. Paying to the recipient a prorata share of the flat grant for that

size household properly prevents state payment of welfare benefits to noneligible individuals. This policy does not presume that income is available to the recipient because the recipient receives his prorata share *unless* the nondependent relative meets that expense for him. The nondependent relative is liable for the shelter or utility cost; the state's policy prevents relatives' attempts to profit by charging disproportionate rents to children in no position to protect themselves. *Johnson v. White*, 528 F.2d 1228, 1237 (2d Cir. 1975). In this situation, then, the DPW's proration policy is valid.

CONSOLIDATION TO FLAT-GRANT SYSTEM

[4] The plaintiffs also challenge the averaging process employed in Texas' change to a flat-grant AFDC system. In *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), the Supreme Court recognized that a state may employ an averaging process to redefine its method for determining need as long as "all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging . . . ." 397 U.S. at 419, 90 S.Ct. at 1221. Our only concern in this process is preventing the state from obscuring the standard of need updated to June 1, 1969 levels as required by Congress in § 602(a) (23). Plaintiffs claim that Texas' consolidation obscured the standard of need.

Insofar as the Texas DPW's proration policy is invalid, the policy's existence at the time Texas computed the statistical averages that let to the flat grant inevitably skewed the averages downward. The proration policy, when applicable, always reduced the allowances for shelter and utilities, foreclosing the possibility of fairly pricing the standard of need for shelter and utilities. Although it is possible that a state

policy that foreclosed fair pricing of one of the factors of the standard of need would have a *de minimis* effect, Texas implicitly concedes the substantial impact of its policy on the averaging. The state's brief remarks that our invalidation of the proration policy would necessitate a new averaging for the budgetary standard of need. As we have concluded that the DPW's proration policy did not comply with federal requirements, Texas must recalculate its budgetary standard of need for its flat-grant system.[7]

Since plaintiffs challenge other averaging procedures which Texas may wish to employ in its new determination, we consider these as well. Plaintiffs complain of two other aspects of DPW's consolidation to a flat-grant system: first, that the DPW averaged in amounts paid to AFDC households with actual shelter needs below the ceilings set by the DPW but averaged in AFDC households with actual shelter needs above the DPW ceilings at the ceiling amount; and second, the DPW averaged in AFDC households with no shelter expense at all. Plaintiffs argue that these procedures unduly obscured the standard of need required by Congress in § 602(a) (23).

To understand the plaintiff's objection to Texas' averaging process, one must understand the components of the averaging. Before converting to a flat-grant system, Texas employed ceilings in its shelter

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[7]We grant Texas a reasonable time to recalculate its budgetary standard of need. As an interim measure, Texas may employ the present budgetary standard of need figures without, of course, utilizing the proscribed proration policy. For example, Texas may wish to restrict its definition of "household" to include only AFDC recipients and a caretaker, if a caretaker is in the household.

allowances under its standard of need. These ceilings reflected Texas' assessment, by means of original cost studies gradually updated, of minimum shelter needs, i.e., those necessary "to provide a reasonable subsistence compatible with decency and health." Tex.Rev.Civ.Stat.Ann. art 695c, § 17(6) (Supp. 1977). These ceilings were properly updated to reflect the cost of living at 1969 levels as required by Congress in 42 U.S.C. § 602(a) (23) (1970). *See Jefferson v. Hackney*, 406 U.S. 535, 543, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972) (Texas' 11% increase in ceilings complied with § 602(a) (23) requirements). Not all families were allowed the ceiling amounts because their actual shelter needs were less; those families were allowed only amounts equal to their actual shelter cost. This system allowed Texas to meet § 602(a) (23) requirements but to keep welfare costs down by allowing less than the ceilings to those who needed less—and so paying lower levels of benefits. When the state averaged its payments to AFDC recipients to determine the amount it should pay in a flat grant, the averaging included families which received only the ceiling amount for shelter and families which received their actual shelter expenses that were less than the ceiling amount. The inevitable result of this process was to produce an averaged figure lower than that of the original ceiling. Plaintiffs complain that this averaging procedure unduly obscured the standard of need.[8]

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[8]Although plaintiffs also protest the inclusion of households with zero shelter expense in the averaging, we do not view this policy as a special case. Of course, insofar as the zero or extremely low shelter expenses derived from the proration policy, they unduly obscured the standard of need. In those cases where the zero shelter need resulted from living in homes not mortaged or rent-free, inclusion of those households in the averaging process was proper. This actual housing cost is zero and is just as relevant as that of the family with extremely low shelter expenses. The difference is only one of degree, not of kind.

Whether Texas' averaging using shelter ceilings violated § 602(a) (23) presents a close and complex question. Resolution of that question requires that we first explore the criteria employed by the Supreme Court in evaluating averaging procedures and then examine the extent to which we may go behind the operation of statistical analysis to examine the result of the procedures. As we noted earlier, *Rosado* clearly authorizes averaging as a process leading to a flat-grant system as long as "all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging . . . ." 397 U.S. 419, 90 S.Ct. at 1221. Definition of the Delphic terms "fair pricing" and "fair averaging" is a prerequisite to meaningful analysis.

[5] That items included in the standard of need by "fairly priced" means only that a state may not artificially price an item so low that the item is essentially eliminated from the standard of need. See *New Jersey Welfare Rights Organization v. Cahill*, 349 F.Supp. 501, 510 (D.N.J.1972), *aff'd*, 483 F.2d 723 (ed Cir. 1973). This definition follows from *Rosado's* proscription of a state's reducing the content of its standard of need. *See* 397 U.S. at 417, 90 S.Ct. 1207. Severe reduction of the price of an item would accomplish the same result as not even considering the item in the standard of need. This definition allows us to examine for violations of § 602(a) (23) egregious manipulations of the standard of need by price reduction, but forces us to recognize that a state—as long as it has complied with § 602(a) (23), as Texas has done—has considerable leeway in determining the proper price for items in its standard of need.

[6] The definition of "fair averaging" has proved more elusive. In the contest in which *Rosado* employed the term— "providing the consolidation on a statistical

basis reflects a fair averaging," 397 U.S. at 419, 90 S.Ct. at 1221—it is clear that "fair averaging" at the very least requires technical statistical validity in the state's procedures. *See New Jersey Welfare Rights Organization v. Cahill, supra* at 510 F.2d 1228 (2d Cir. 1975), the Second Circuit invalidated a portion of Connecticut's conversion to a flat-grant system when it found that Connecticut had employed a sample too small to produce a statistically meaningful average. 528 F.2d at 1238-40. Not only do we endorse this approach to the fair-averaging definition,but we also view "fair averaging" in a broader context not tied to the Supreme Court's use of those terms. Like the district court in *Roselli v. Affleck*, 373 F.Supp. 36 (D.R.I.), *aff'd*, 508 F.2d 1277 (1st Cir. 1974), we "must look at the end product of the averaging process to determine whether the figures produced by the averaging are consistently and materially out of proportion with the relevant former definition of 'standard of need'." 373 F.Supp. at 44. Examining Texas' averaging approach, we find no violations of either of these criteria.

Texas fairly priced shelter needs when it included the amounts actually paid to welfare families during the relevant periods. It is true that those families who received the ceiling amounts might have had greater shelter needs that reflected in the ceiling amounts, but a state is entitled to some flexibility in assessing a fair price for shelter needs. These ceilings have already met the requirements of 42 U.S.C. § 602(a) (23). *See Jefferson v. Hackney, supra.* We cannot say that a price that meets § 602(a) (23)'s criteria is so artificially low that it is eliminated from the standard of need of those families included in the averaging.

Texas fairly averaged in its statistical analysis. Plaintiffs do not assert that Texas omitted any factor of the old standard of need equation in its calculations.

unlike New York's omission of a "special grants" category in *Rosado.* Texas averaged the amounts actually paid to all AFDC households of various sizes and compositions on four separate occasions in 1972. *See* n. 4, *supra.* The technical basis for the DPW's statistical analysis—the size of the sample, the timing of the samples, etc.—appears unassailable. To some extent the DPW's use of ceilings in the averaging process produced figures less than the maximum standard of need recognized by the DPW, but the reduction was not significant. After the institution of the new system, Texas paid out almost exactly the same amount of money as under the old system. Texas' averaging process produced no broad distortion in the former standard of need that would lead to condemnation under § 602(a) (23).

RETROACTIVE RECOVERY

[7] Plaintiffs also seek recovery of retroactive AFDC benefits. Their claims are foreclosed by the eleventh amendment. *See Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Plaintiffs argue that the Children's Assistance Fund and the Disabled Assistance Fund created by Tex.Rev.Civ.Stat.Ann. art 594c, § 27(1) (1976) Supp.) are funds separate from the state treasury so that *Edelman* does not apply. They rely on *Bowen v. Hackett*, 387 F.Supp. 1212 (D.R.I.1975), which held that the eleventh amendment did not bar a recovery against a state unemployment fund financed solely by employers' contributions. In our case, however, the separate funds created for public welfare programs are only a matter of bookkeeping convenience: they are still funded by the state so that any award would resemble too closely a money judgment against the state itself. *See Edelman, supra* at 665, 94 S.Ct. 1347. Plaintiffs are entitled to no damage recovery.

CONCLUSION

A major part of the DPW's proration policy violates 45 C.F.R. § 233.90(a). The violation infected the averaging process so as to require a new evaluation of the proper standard of need. In making this reevaluation, Texas is free to use the averaging procedure first employed as long as it purges that procedure of the proration taint. During a reasonable period for recalculating the chart figure, Texas may employ the flat'grant figures in present charts without, of course, employing the proscribed aspect of the proration policy.

REVERSED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1976

No. 75-2815

D.C. Docket No. CA-73-H-296

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL., ETC.,

Plaintiffs-Appellants,

versus

RAYMOND W. VOWELL, Commissioner of the Texas State Department of Public Welfare, ET AL., ETC.,

Defendants-Appellees.

Appeal from the United States District Court for the **Southern District of Texas**

Before **GODBOLD, SIMPSON and GEE, Circuit Judges.**

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the **Southern District of Texas, and was argued by counsel;**

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, **reversed;**

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the cost on appeal to be taxed by the Clerk of this Court.

July 13, 1977

Issued as Mandate:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 75-2815

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

Plaintiffs-Appellants,

versus

RAYMOND W. VOWELL, Commissioner of the Texas State Department of Public Welfare, ET AL., ETC.,

Defendants-Appellees.

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Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(August 22, 1977)

Before GODBOLD, SIMPSON and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied.*

ENTERED FOR THE COURT:

S/S

United States Circuit Judge

APPENDIX E

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to suprevise the administration of the plan; (4) provide for granting an opportunity for fair hearing before the State agency to any granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness; (5) provide such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan; and (6) provide that the State agency will make such reports, in such form and containing such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports; (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any

child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 532(b) (2) and (3) of this title); and

(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child, and

(ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;

except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of—

(C) any one of the persons speficied in clause (ii) of subparagraph (A) if such person—

(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or

(ii) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; or

(D) any of such persons specified in clause (ii) of subparagraph (A) if with respect to such month the income of the persons so specified (within the meaning of clause (7) was in excess of their need as determined by the State agency pursuant to clause (7) (without regard to clause (8)), unless, for any one of the four months preceding such month, the needs of such persons were met by the furnishing of aid under the plan;

(9) provide safeguards which restrict the use of[1] disclosure of information concerning applicants or recipients to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part B, C, or D of this subchapter or under subchapter I, X, XIV, XVI, XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, and (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need; and the safeguards so provided shall prohibit disclosure, to any committee or a legislative body, of any information which identifies by name or address any such applicant or recipient; (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals; (11) provide for prompt notice (including the transmittal of all relevant information) to the State child support collection agency (established pursuant to part D of this title) of the furnishing of aid to families with dependent children with respect to a child who has been deserted or abandoned by a parent (including a child born out of wedlock without regard to whether the paternity of such child has been established); (12) provide, effective October 1, 1950, that no aid will be furnished any individual under the plan with respect to any period with respect to which he is receiving old-age assistance under the State plan approved under section 302 of this title;

(13), (14) Repealed. Pub. L. 93-647, § 3(a) (2), Jan. 4, 1975, 88 Stat. 2348.

(15) provide as part of the program of the State for the provision of services under subchapter XX of this chapter (A) for the development of a program, for each appropriate relative and dependent child receiving aid under the plan and for each appropriate individual (living in the same home as a relative and child receiving such aid) whose needs are taken into account in making the determination under clause (7), for preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life, and for implementing such program by assuring that in all appropriate cases (including minors who can be considered to be sexually active) family planning services are offered to them and are provided promptly (directly or under arrangements with others) to all individuals voluntarily requesting such services, but acceptance of family planning services provided under the plan shall be voluntary on the part of such members and individuals and shall not be a prerequisite to eligibility for or the receipt of any other service under the plan; and (B) to the extent that services provided under this clause or clause (14) are furnished by the staff of the State agency or the local agency administering the State plan in each of the political subdivisions of the State, for the establishment of a single organizational unit in such State or local agency, as the case may be, responsible for the furnishing of such services; (16) provide that where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State, providing such data with respect to the situation it may have;

(17), (18) Repealed. Pub.L. 93—647, § 101(c) (8), Jan. 4, 1975, 88 Stat. 2360.

(19) provide—

(A) that every individual, as a condition of eligibility for aid under this part, shall register for manpower services, training, and employment as provided by regulations of the Secretary of Labor, unless such individuals is—

(i) a child who is under age 16 or attending school full time;

(ii) a person who is ill, incapacitated, or of advanced age;

(iii) a person so remote from a work incentive project that his effective participation is precluded;

(iv) a person whose presence in the home is required because of illness or incapacity of another member of the household;

(v) a mother or other relative of a child under the age of six who is caring for the child; or

(vi) the mother or other female caretaker of a child, if the father or another adult male relative is in the home and not excluded by clause (i), (ii), (iii), or (iv) of this subparagraph (unless he has failed to register as required by this subparagraph, or has been found by the Secretary of Labor under section 633 (g) of this title to have refused without good cause to participate under a work incentive program or accept employment as described in subparagraph (F) of this paragraph);

and that any individual referred to in clause (v) shall be advised of her option to register, if she so desires, pursuant to this paragraph, and shall be

informed of the child care services (if any) which will be abailable to her in the event she should decide so to register;

(B) that aid under the plan will not be denied by reason of such registration or the individual's certification to the Secretary of Labor under subparagraph (G) of this paragraph, or by reason of an individual's participation on a project under the program established by section 632(b) (2) or (3) of this title;

(C) for arrangements to assure that there will be made a non-Federal contribution to the work incentive programs established by part C by appropriate agencies of the State or private organizations of 10 per centum of the cost of such programs, as specified in section 635(b) of this title;

(D) that (i) training incentives authorized under section 634 of this title and income derived from a special work project under the program established by section 632(b) (3) of this title shall be disregarded in determining the needs of an individual under section 602(a) (7) of this title, and (ii) in determining such individual's needs the additional expenses attributable to this participation in a program established by section 632(b) (2) or (3) of this title shall be taken into account;

(E) Repealed. Pub.L. 92-223, § 3(a) (5), Dec. 28, 1971, 85 Stat. 804.

(F) that if and for so long as any child, relative, or individual (certified to the Secretary of Labor pursuant to subparagraph (G)) has been found by the Secretary of Labor under section 633 (g) of this title to have refused without good cause to participate under a work incentive program

established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment—

(i) if the relative makes such refusal, such relative's needs shall not be taken into account in making the determination under clause (7), and aid for any dependent child in the family in the form of payments of the type described in section 606(b) (2) of this title (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 608 of this title will be made;

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for any such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall, for a period of sixty days, make payments of the type described in

section 606 (b) (2) of this title (without regard to clauses (A) through (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clause (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case may be, to participate in such program in accordance with the determination of the Secretary of Labor; and

(G) that the State agency will have in effect a special program which (i) will be administered by a separate administrative unit and the employees of which will, to the maximum extent feasible, perform services only in connection with the administration of such program, (ii) will provide (through arrangements with others or otherwise) for individuals who have been registered pursuant to subparagraph (A), in accordance with the order of priority listed in section 633(a) of this title, such health, vocational rehabilitation, counseling, child care, and other social and supportive services as are necessary to enable such individuals to accept employment or receive manpower training provided under part C, and will, when arrangements have been made to provide necessary supportive services, including child care, certify to the Secretary of Labor those individuals who are ready for employment or training under part C, (iii) will participate in the development of operational and employability plans under section 633(b) of this title; and (iv) provides for purposes of clause (ii), that, when more than one kind of child care is

available, the mother may choose the type, but she may not refuse to accept child care services if they are available;

(20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 608 of this title;

(21), (22) Repealed. Pub.L. 93—647, § 101(c) (8), Jan 4, 1975, 88 Stat. 2360.

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted; (24) provide that if an individual is receiving benefits under subchapter XVI of this chapter, then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of benefits of the family under this subchapter and his income and resources shall not be counted as income and resources of a family under this subchapter; (25) provide (A) that, as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the State agency his social security account number (or numbers, if he has more than one such number), and (B) that such State agency shall utilize such account numbers, in addition to any other means of identification it may determine to employ in the administration of such plan; (26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required—

(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member

for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed,

(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b) (2) (without regard to subparagraphs (A) through (E) of such section);

(27) provide, that the State has in effect a plan approved under part D and operate a child support program in conformity with such plan; and (28) provide that, in determining the amount of aid to which an eligible family is entitled, any portion of the amounts collected in any particular month as child support pursuant to a plan approved under part D of this subchapter and retained by the State under section 657 of this title, which (under the State plan approved under this part as in effect both during July 1975 during that particular month) would not have caused a reduction in the amount of aid paid to the family if such amounts had been paid directly to the family, shall be added to the amount of aid

otherwise payable to such family under the State plan approved under this part.

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceeding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

(c) The Secretary shall, on the basis of his review of the reports received from the States under clause (15) of subsection (a) of this section, compile such data as he believes necessary and from time to time publish his findings as to the effectiveness of the programs developed and administered by the States under such clause. The Secretary shall annually report to the Congress (with the first such report being made on or before July 1, 1970) on the programs developed and administered by each State under such clause (15).